ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2003

Ms. Deborah C. Hiser
Hilgers & Watkins, P.C.
P.O. Box 2063
Austin, Texas 78768

OR2003-8390

Dear Ms. Hiser:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191420.

The Austin Travis County Mental Health Mental Retardation Center (the "center"), which you represent, received a request for, among other things, certain utilization reports.[1] You advise that the center is making some of the requested information available to the requestor. However, you claim that a portion of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.[2]

---

[1]You state that "utilization reports" are labeled "client services reports" and "schedule reports" by the center. You also state that this request for an opinion is limited to confidential information in these reports.

[2]You explain that although the center does not have records that respond to all of the requestor's questions, the submitted schedule reports contain responsive information. We note that the Public Information Act (the "Act") does not require the center to answer factual questions, perform legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989); *see also AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681(Tex. App.–Eastland, pet. denied). Additionally, we note that the Act does not require the center to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). However, the center must make a good faith attempt to relate a request to information it holds. *See* Open Records Decision No. 561 at 8 (1990).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that portions of the submitted information are not subject to release under regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and that the information is therefore excepted from disclosure under section 552.101 of the Government Code in conjunction with these regulations. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. 45 C.F.R. § 160.103. In this instance, we understand that center is a health care provider for purposes of section 160.103. Therefore, we will next determine whether the submitted information is confidential as protected health information under the federal law.

Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms as follows:

> Health information means any information, whether oral or recorded in any form or medium, that:
>
> > (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
> >
> > (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.
>
> Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) That identifies the individual; or
>
> (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.
>
> Protected health information means individually identifiable health information:
>
> (1) Except as provided in paragraph (2) of this definition, that is:
>
> (i) Transmitted by electronic media;
>
> (ii) Maintained in electronic media;
>
> (iii) Transmitted or maintained in any other form or medium.

45 C.F.R. § 160.103. You contend that the submitted information constitutes individually identifiable protected health information. Upon review of the information, we agree that it is protected health information as contemplated by HIPAA. However, we note that a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., de-identified. 45 C.F.R. § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information do not apply to information de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. 45 C.F.R. § 164.502(d)(2).

Under HIPAA, a covered entity may determine health information is not individually identifiable only under certain circumstances. One method requires a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable to apply and document such methods and principles to determine release of protected health information would result in a very small risk of individual identification. 45 C.F.R. § 164.514(b)(1). The other method requires the covered entity to meet the following two criteria: 1) remove specific identifiers, including but not limited to, names, dates directly related to an individual, telecommunication numbers, vehicle identifiers, and any other unique identifying number, characteristic, or code and 2) have no actual knowledge that the information could be used alone or in combination

with other information to identify an individual who is a subject of the information. *See* 45 C.F.R. § 164.514(b)(2)(i), (ii).

You explain that the center can de-identify the protected health information. Consistent with the second method of de-identification, we have marked the types of specific identifiers that must be redacted in the submitted protected health information. *See* 45 C.F.R. § 164.514(b)(2)(i)(A)-(R). Therefore, if the center has actual knowledge that the de-identified information could be used alone or in combination with other information to identify the subject of the health information, then the center must withhold the protected health information in its entirety under section 552.101 of the Government Code in conjunction with HIPAA. To the extent that the center has no actual knowledge that the de-identified information could be used alone or in combination with other information to identify the subject of the health information, the center must withhold only the types of information that we have marked under section 552.101 of the Government Code in conjunction with HIPAA.

In regard to the remaining de-identified health information, we note the applicability of section 611.002 of the Health and Safety Code. Generally, HIPAA preempts a contrary provision of state law. *See* 45 C.F.R. § 160.203. For purposes of HIPAA, "contrary" means the following:

> (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
>
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable.

45 C.F.R. § 160.202. It is not impossible for the center to comply with both section 611.002 and HIPAA. Furthermore, section 611.002 is not an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. In fact, one of the purposes of section 611.002 is to protect patient privacy. Therefore, HIPAA does not preempt section 611.002.

Section 611.002 of the Health and Safety Code applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). The remaining submitted information consists of mental health records that are within the scope of section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

In summary, we conclude that: 1) the center must withhold the types of information we have marked under HIPAA; and 2) the remaining submitted information is confidential under section 611.002 and may only be released in accordance with sections 611.004 and 611.0045 of the Health and Safety Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 191420

Enc: Submitted documents

c: Ms. Mary Ellen Elveda
c/o Ms. Deborah C. Hiser
Hilgers & Watkins
98 San Jacinto Boulevard
Austin, Texas 78701
(w/o enclosures)